Nos. 18-18 & 17-1717

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF MEDAL OF HONOR RECIPIENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Hershel Woodrow Williams, Charles S. Kettles, Robert Roland Ingram, and Allen James Lynch (collectively, "the Medal of Honor recipients") have a strong interest in this case because they are among the rarest of veterans. They are each recipients of the Medal of Honor. These men have lifelong commitments to honoring the history and memory of fallen American servicemen, a mission that is threatened by the Fourth Circuit's decision.

The Medal of Honor is the highest military decoration that can be given by the United States to a member of the armed forces. It is awarded by the President of the United States "to a person who, while a member of [the armed forces], distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty." 10 U.S.C. § 3741 (Army); *see also id.* § 6248 (Navy, Marine Corps, and Coast Guard), *id.* § 8741 (Air Force). In the nation's history, the Medal of Honor has only been awarded approximately 3500 times, including more than 600 posthumous awards. *Medal of Honor Statistics,* The United States Army, https://www.army.mil/medalofhonor/statistics.html

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, either by express written consent or by filing a letter documenting consent with the Court. The parties have also been given appropriate notice.

(last visited July 24, 2018). There are presently 72 living Medal of Honor recipients. *Living Recipients*, Congressional Medal of Honor Society, http://www.cmohs.org/living-recipients.php (last visited July 24, 2018). Medals of Honor have been awarded to heroes of diverse religious creeds, reflecting that throughout the nation's history, veterans have come from all religions (or none at all).

The Medal of Honor recipients are profoundly troubled by the decision below. The Fourth Circuit's ruling threatens to destroy the Bladensburg Peace Cross, a prominent World War I memorial, and its reasoning also puts countless other veterans memorials at risk. The Medal of Honor recipients submit this amicus brief to emphasize the importance and urgency of the issues raised in the petitions, provide additional historical context on the role of veteran memorials, and show how the Fourth Circuit's entanglement analysis is both plainly wrong and a threat to the maintenance of other war memorials.

The Medal of Honor recipients' interest in this case also reflects the fact that one of the deceased veterans honored on the plaque at the Bladensburg Peace Cross is a fellow Medal of Honor recipient, Henry Hulbert. *World War I Memorial Cross (Peace Cross) Plaque, Bladensburg, Prince George's County, Maryland, April 1975*, Digital Md., http://collections.digitalmaryland.org/cdm/ref/collection/pgjw/id/551 (last visited July 24, 2018); *Henry Lewis Hulbert*, Congressional Medal of Honor Society, http://www.cmohs.org/recipient-

detail/2236/hulbert-henry-lewis.php (last visited July 24, 2018).

Messrs. Williams, Kettles, Ingram, and Lynch each have unique stories of valor, endurance, courage, and dedication, which are recounted below. But woven through each of their stories is a common thread of patriotism and service. They have each devoted considerable time to veterans causes and care deeply about civic education, preserving history, and remembering fallen servicemen.

1. Chief Warrant Officer Hershel Woodrow Williams

Hershel Woodrow "Woody" Williams was born on October 2, 1923, in Quiet Dell, West Virginia, and received the Medal of Honor on October 5, 1945, for his valiant and selfless conduct during the Battle of Iwo Jima in World War II. *See Hershel Woodrow Williams*, Congressional Medal of Honor Society, http://www.cmohs.org/recipient-detail/3066/williams-hershel-woodrow.php (last visited July 24, 2018). Williams, at that time a Corporal, was assigned to the 21st Marine Regiment, 3d Marine Division. Near the beginning of the five-week Battle, Cpl. Williams volunteered to assist American tanks open a lane through a heavily fortified area of reinforced concrete pillboxes. Covered by only four riflemen, Cpl. Williams single-handedly attacked the individual pillbox fortifications with a flamethrower, reducing the machine-gun fire being leveled at the American troops. *Id.* Under heavy fire and frequently at the rear of the hostile forces, Cpl. Williams neutralized

seven fortifications, running back and forth to his own lines to prepare demolition charges and trade out spent flamethrowers. At one point, he crept close enough to a fortified pillbox to jam the nozzle of his flamethrower into one of the pillbox's embrasures. During the attack, he was also charged by enemy riflemen with bayonets, whom he repelled with his flamethrower. *Id.* After four hours of harrowing work, the enemy line was broken, and the American troops were able to advance. *See Medal of Honor Recipient Hershel "Woody" Williams Interview*, Pritzker Military Museum & Library (Jan. 24, 2008, 6:00 PM), https://www.pritzkermilitary.org/whats_on/medal-honor/medal-honor-recipient-hershel-woody-williams-interview/ (last visited July 24, 2018).

Williams is the only surviving Marine to have received the Medal of Honor for service during the Second World War and is the only surviving honoree from the Pacific theater. Following World War II, Williams continued his service in the Marine Corps, receiving an honorable retirement after approximately seventeen years of service. Williams also served as the chaplain of the Congressional Medal of Honor Society for thirty-five years. In 2010, Williams founded the Hershel Woody Williams Medal of Honor Foundation, a not-for-profit organization that establishes permanent memorials and provides scholarships for "Gold Star" families and children who have lost a loved one in military service.

The Foundation promotes and builds monuments to recognize the families of fallen service

members, preserve the memory of the fallen, and remind communities of the high cost of freedom. Each monument displays the "Gold Star," recognizing the families who lost a loved one in service, and four vignettes depicting scenes of homeland, family, patriotism, and sacrifice. *Monument Overview*, Hershel Woody Williams Medal of Honor Foundation, http://hwwmohf.org/monument-overview.html (last visited July 24, 2018). The first monument was unveiled in 2013, one of the first monuments in the country to recognize the families of fallen service members. As of today, Williams and his foundation are responsible for establishing thirty-nine Gold Star Families memorials across the United States, with forty more memorial monuments underway, in thirty-seven states. *See Memorial Monuments*, Hershel Woody Williams Medal of Honor Foundation, http://hwwmohf.org/monument-projects.html (last visited July 24, 2018).

2. Lieutenant Colonel Charles S. Kettles

Charles S. Kettles was born in Ypsilanti, Michigan, on January 9, 1930. His father—an immigrant—had enlisted as a pilot for the United States the day after the Japanese bombed Pearl Harbor. Kettles followed in his father's footsteps. In 1951, he was drafted into the Army. He became a commissioned officer and served tours as a pilot in Korea, Japan, and Thailand before returning home to Michigan in 1956. But his service to his country was not over. He remained an Army reservist even as he opened a Ford dealership with his brother. *See*

Lieutenant Colonel Charles Kettles Medal of Honor Vietnam War, Army.Mil Features, https://www.army.mil/medalofhonor/kettles/ (last visited July 24, 2018). (hereinafter "*Medal of Honor*")

In 1963, Kettles returned to active duty, answering a call for pilots to support the war in Vietnam. *Id.* He became trained to fly the famed UH-1D Huey helicopter and joined a newly formed helicopter unit as a flight commander.

Kettles found himself in Vietnam on May 15, 1967. That morning, he learned that the 101st Airborne Infantry unit had been ambushed by North Vietnamese guerrilla fighters and was trapped in a riverbed, taking heavy fire. Kettles immediately volunteered to lead a flight of six Huey helicopters to bring reinforcements and evacuate the wounded. *Id.* When he reached the landing zone for the first time that day, he saw a wall of green enemy tracers coming at him. Neither Kettles nor the men he was leading had ever seen fire so intense. *See Remarks by the President at Presentation to Lieutenant Colonel (Ret.) Charles Kettles, U.S. Army*, The White House (July 18, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/07/18/remarks-president-presentation-lieutenant-colonel-ret-charles-kettles-us (last visited July 24, 2018) (hereinafter "*Presidential Remarks*"). Kettles landed his helicopter and remained exposed long enough to collect the wounded in the face of danger. He brought them to safety.

Kettles returned to the combat scene with additional reinforcements and landed again amid heavy enemy fire. His helicopter sustained heavy damage and began leaking fuel, but he nursed it back to base. And then he found a different helicopter and went back for a third time to evacuate 44 remaining soldiers. He refused to depart until told that all personnel were onboard. But once airborne, he was informed that eight troops—the rearguard who had provided cover during the extraction—remained stranded by the intense enemy fire. Kettles knew that if those eight soldiers were left behind, they would die. *Id.* Disregarding his own safety, he went back for them—a lone helicopter returning to battle without any cover or support. As soon as he landed, a mortar round shattered both windshields. Shrapnel ripped through the cockpit, tearing into Kettles's seat. *Id.* Still he remained until all eight remaining troops made it safely on board. By the time they did, the helicopter was badly damaged. It was carrying thirteen servicemen. And it was 600 pounds over its weight limit. Somehow the helicopter managed to take off, but another mortar hit the helicopter shortly after it went airborne. It fishtailed violently, throwing a soldier from the cabin to cling to a skid as Kettles flew the soldiers in his charge to safety. *Id.*

Kettles returned to the United States in 1970 to live a model American life. *See Medal of Honor, supra.* He has ten children. He and his wife Ann celebrated forty years of marriage. He taught aviation at Eastern Michigan University and served on his town's city council. *See Presidential Remarks,*

supra. Nearly half a century went by before Kettles received the Medal of Honor for his conspicuous gallantry and intrepidity in going back, not once, not twice, but four times for his comrades at the risk of his own life and beyond the call of duty. When he learned he would be receiving the military's highest honor, Kettles said it "seems like a hell of a fuss over something that happened 50 years ago." *Id.* But as President Obama noted at the award ceremony, the "hubbub" was well-earned. Kettles's story was a reminder of "the goodness and decency of the American people, and the way that we can all look out for each other, even when times are tough, even when the odds are against us." *Id.*

3. Hospital Corpsman Third Class Robert Roland Ingram

Robert Roland Ingram was born January 20, 1945, in Clearwater, Florida, and was awarded the Medal of Honor on July 10, 1998, for his extraordinary heroism during an attack in Quang Ngai Province, South Vietnam on March 28, 1966. *See Remarks by the President in Presentation of the Medal of Honor on Robert R. Ingram*, White House Office of the Press Secretary (July 10, 1998), https://clintonwhitehouse4.archives.gov/WH/New/html/19980710-92.html (last visited July 24, 2018) (hereinafter "*Ingram Presidential Remarks*").

Ingram joined the Navy in 1963 at the age of 18, with an aviation electronics guarantee. *Interview with Robert Ingram*, Veterans History Project, http://memory.loc.gov/diglib/vhp/story/loc.natlib.afc2

001001.89697/transcript?ID=mv0001 (last visited July 24, 2018) (hereinafter interview with Robert Ingram). After catching pneumonia, however, Ingram witnessed a spinal meningitis outbreak and was impressed by the selfless actions of the hospital corpsmen. *Id.* Following this experience, Ingram attended Hospital Corps School, and went to Vietnam with Company C (Charlie Company), 1st Battalion, 7th Marines, in July 1965. *Id.*; *Ingram Presidential Remarks, supra.*

A fully staffed unit when it landed in Vietnam, Charlie Company had fewer than 115 men on March 28, 1966. *Interview with Robert Ingram, supra.* Ingram, a 21-year-old Petty Officer at the time, accompanied the point platoon as Charlie Company was unexpectedly attacked by 100 North Vietnamese Aggressors. *Ingram Presidential Remarks, supra.* Enemy fire lacerated a tree line, decimating the platoon in moments. *Id.* Oblivious to the danger, Ingram crossed the battlefield to reach a downed Marine. *Id.* As Ingram administered aid, he was shot in the hand. *Id.* Despite his own injury, Ingram continued to traverse the fire-swept landscape to assist the wounded, sustaining additional gunshots to his knee and a close-range bullet to the head. *Interview with Robert Ingram, supra.* Deaf and partly blinded, Ingram killed the Vietnamese soldier who shot him at close range and continued collecting ammunition from dead soldiers to use against the enemy. *Id.* Ingram sustained his fourth gunshot wound while dressing the head wound of another corpsman. *Id.*

Although he endured extreme pain from his injuries and faced the possibility of his own death, Ingram continued to doctor Marines for several additional hours. *Id.* He tried to refuse evacuation, insisting that other Marines should be evacuated first. *Ingram Presidential Remarks, supra.* By the time Ingram was pulled to safety, his vital signs were so low that he was tagged "killed in action" and placed in a dead pile. *Id.* After an eight-month recovery period, Ingram went back to sea on another deployment, and was eventually discharged from the Navy in 1968. *Robert Roland Ingram*, U.S. Navy Memorial, http://navylog.navymemorial.org/ingram-robert-1 (last visited July 24, 2018). Following his discharge, Ingram enrolled in college to pursue a nursing degree and worked as a registered nurse at a family practice in Florida. *Id.* He later married and raised two children. Although the original Medal of Honor nomination for HM3 Ingram had been lost, Ingram's unit worked tirelessly to ensure that he received his deserved recognition. *Ingram Presidential Remarks, supra.* In 1998, thirty-two years after his heroism, Ingram became the first Navy veteran in twenty years to receive the Medal of Honor. *Robert Roland Ingram, supra.*

4. Sergeant Allen James Lynch

Allen James Lynch was born October 28, 1945, in Chicago, Illinois, and received the Medal of Honor on May 14, 1970, for "conspicuous gallantry and intrepidity in action" during a Dec. 15, 1967 enemy attack on his unit near the village of My An, in Vietnam's Binh Dinh Province. *Allen James Lynch,*

Congressional Medal of Honor Society, http://www.cmohs.org/recipient-detail/3350/lynch-allen-james.php (last visited July 24, 2018).

At the time of the attack, Lynch was a 22-year-old Specialist 4th Class serving as a radio telephone operator with the 12th Cavalry's Company D, 1st Battalion. *Id.*; *Medal of Honor Recipient Allen J. Lynch Interview (#1)*, Pritzker Military Museum & Library (Apr. 14, 2004), http://www.pritzkermilitary.org/whats_on/medal-honor/medal-honor-recipient-allen-j-lynch-interview-number-1/ (last visited July 24, 2018) (hereinafter "*Pritzker Interview*"). Lynch's unit had been in the field experiencing near-daily enemy contact for about a month and was pulled back for an "in-country stand down" to rest and recharge. *Id.* at 20:18. Shortly after being pulled back, however, the unit received word that another unit had been ambushed and needed assistance. *Id.* at 20:33. Lynch's unit joined them via air assault to assist, only to be ambushed themselves. *Id.* at 21:15.

In the ensuing firefight, Lynch spotted three fellow soldiers lying on the ground, wounded and exposed. *Allen James Lynch*, U.S. Army Medal of Honor, https://www.army.mil/medalofhonor/citations25.html#L (last visited July 24, 2018) (hereinafter "*Lynch Medal of Honor*"). Lynch ran 50 meters through heavy enemy fire to administer aid, then returned to the open field three times to carry each soldier to a nearby trench for safety. *Id.* When his unit was forced to withdraw, Lynch stayed with the wounded

men, defending the trench alone for two hours with only his rifle and a grenade. *Id.* He then crossed 70 meters of open terrain—five times—to move the soldiers to a more secure area. *Id.* Finally, he was able to contact another friendly company that had joined the fight, and he assisted in directing the attack and evacuating the wounded men. *Id.* Lynch was granted the Medal of Honor for his actions "at the risk of his life above and beyond the call of duty." *Id.*

After leaving active duty in April 1969, Lynch continued to serve his country. He served in the U.S. Army reserves from 1972-1985 and in the U.S. Army National Guard from 1985-1994, retiring as a First Sergeant. *Pritzker Interview* at 1:05. In 1970, Lynch went to work for the Veterans Administration, and in 1985 he became chief of the Veterans Rights Bureau for the Illinois Attorney General's office. *Id.* Lynch also started the Allen J. Lynch Medal of Honor Veterans Foundation, a charitable organization that provides temporary financial assistance to veterans and their families. *Allen J. Lynch to be awarded the DAR Distinguished Citizen Medal by North Shore Chapter, Lake Forest, Illinois-National Society Daughters of the American Revolution, Deerfield Review*, Feb. 7, 2018, http://www.chicagotribune.com/suburbs/deerfield/community/chi-ugc-article-allen-j-lynch-to-be-awarded-the-dar-distingu-2018-02-07-story.html (last visited July 24, 2018).

Now retired, Lynch continues to volunteer with the Vietnam Veterans of America, serves as a liaison for the Congressional Medal of Honor Society, and

gives speeches for military-related events and for other audiences. *Id.*

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Bladensburg Peace Cross has stood since 1925 as a tribute to fallen Maryland veterans. The memorial symbolizes national unity, shared remembrance, and patriotism. Nothing in the memorial itself, let alone its routine maintenance or public usage, violates the Establishment Clause. The fact that the Fourth Circuit reached the opposite conclusion shows how far the court erred. Review is needed to save the Bladensburg memorial from destruction and dismemberment and to ensure that countless other veterans memorials are not endangered.

The Medal of Honor recipients fully support the certiorari petitions filed by the American Legion and Maryland-National Capital Park and Planning Commission. The Fourth Circuit's decision turns the Establishment Clause upside down by crediting generalized objections to alleged religious symbols over the specific history and secular meaning of a longstanding war memorial. Even if Respondents' objections to the Peace Cross are taken at face value, "an Establishment Clause violation is not made out any time a person experiences a sense of affront." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1826 (2014). Such alleged affronts are not sufficient to invalidate symbols and practices deeply embedded in the nation's history and tradition.

Building and maintaining veterans memorials, including those that incorporate various degrees of religious imagery, is consistent with the nation's longstanding "historical practices and understandings." *Id.* at 1819 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)). From 1919 until 1942, Medals of Honor given to members of the Navy, Marine Corps, and Coast Guard were in the shape of a cross. *History*, The Congressional Medal of Honor Society, http://www.cmohs.org/medal-history.php (last visited July 24, 2018). Other medals also incorporate semi-religious imagery, as discussed below. And the inscriptions on the Bladensburg Peace Cross—"valor, endurance, courage, and devotion" (App. 42a)—mimic language routinely used in Medal of Honor commendations.[2] These otherwise religious symbols convey secular messages when used in war memorials.

The Fourth Circuit also overlooks the role of state and local governments in working with veterans groups to build and maintain memorials. Many veterans memorials nationwide sit on public lands or receive some degree of government support for maintenance and upkeep. Certiorari should be granted to reject the Fourth Circuit's finding that providing routine maintenance and upkeep to

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[2] All appendix citations refer to the appendix accompanying the petition filed by the American Legion.

monuments such as the Bladensburg Peace Cross constitutes excessive entanglement.

ARGUMENT

I. The Fourth Circuit's Decision Endangers Veterans Memorials Around the Country

The panel majority below found that the Bladensburg Peace Cross—a monument "established in memory of soldiers who died in World War I" as "part of a memorial park honoring veterans in Bladensburg" adjacent to the "Star-Spangled Banner National Historical Trail"—was not primarily a patriotic display or veterans memorial but instead "has the primary effect of endorsing religion." App. 3a, 6a. (internal quotation marks omitted). The Fourth Circuit's dismissive treatment of the Bladensburg Peace Cross as a "purported war memorial," App. 3a, sends an unmistakable message of casual indifference to war memorials. If not reversed, the decision below threatens the existence of a longstanding monument that honors one of the Medal of Honor recipients' fallen brethren, puts other memorials at risk, and sends of message of callous disregard for the sacrifices of veterans.

A. The Fourth Circuit's Decision Conflicts with Precedent

This Court has long acknowledged the secular messages of war memorials. In *Buono*, the Court observed that an unadorned Latin cross placed in the desert as a war memorial was "not merely a

reaffirmation of Christian beliefs" but also "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar v. Buono*, 559 U.S. 700, 721 (2010); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944-45 (2012) (Alito, J., respecting the denial of certiorari); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007-08 (2011) (Thomas, J., dissenting from denial of certiorari); *cf. Van Orden v. Perry*, 545 U.S. 677, 689-90, 692 (2005) (recognizing the dual religious and historical significance of a Ten Commandments memorial). Cases like this one (which has dragged on for many years) will continue to vex federal, state, and local governments unless and until the Supreme Court reaffirms the law and common sense. The Medal of Honor Recipients urge the Court to do so here.

Because displays that incorporate otherwise religious symbols can carry multiple meanings, courts should avoid finding "an Establishment Clause violation . . . any time a person experiences a sense of affront." *Town of Greece*, 134 S. Ct. at 1826. Yet that is what the Fourth Circuit did here, yielding to the demands of three residents who claim to "have faced multiple instances of unwelcome contact with the Cross" "while driving in the area," leaving them "offended." App. 7a. The Fourth Circuit's approach strays from the underpinnings of the Establishment Clause and warrants correction. The Establishment Clause has historically served to prevent coerced religious adherence, not to save passersby from seeing

a display they find disagreeable. "Offense . . . does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826.

The mere existence of religious imagery, particularly in the context of an otherwise secular memorial, is also not coercion. To forbid religious imagery from all secular displays and memorials is itself coercive and an affront. "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred." *Id.* at 1822. Yet that again is what the Fourth Circuit did here, finding that "[w]hile the Latin cross may generally serve as a symbol of death and memorialization, it only holds value . . . because of its affiliation with the crucifixion of Jesus Christ." App. 18a.

B. Holding the Peace Cross to Be Anything Other Than a War Memorial Is an Affront to Veterans and Endangers Other Monuments

The importance of this case cannot be understated. Other veterans memorials will be endangered if the Fourth Circuit's decision is not reversed. Memorials that display a cross—such as the Argonne Cross at Arlington National Cemetery, the Irish Brigade Monument at Gettysburg National Military Park, the Vietnam War Memorial at La Mesa, California, or a memorial in Taos, New Mexico commemorating servicemen who endured the Bataan Death March—are subject to suit, removal, or defacement under the logic of the Fourth Circuit's decision. Although the panel majority "note[s] that

[its] opinion does not presuppose any particular result (i.e., removing the arms or razing the Cross entirely)," App. 29a n.19, its logic ordains such a result, which is exactly what Respondents seek: "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." App. 8a n.7. (internal quotation marks and citation omitted).

Even worse, leaving the Fourth Circuit's decision intact sends a chilling message of disrespect to veterans: "removal would [be] viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." *Buono*, 559 U.S. 726 (Alito, J., concurring). The Medal of Honor recipients have long promoted memorials and monuments because they provide the public with spaces to remember and honor the heroism and sacrifices of veterans. Memorials are not stone statues but places where the stories of veterans live on for posterity. Veterans memorials play a crucial role in protecting and celebrating these stories by symbolizing and preserving this history. Contrary to the Fourth Circuit's findings, that secular message is the primary message sent by veterans memorials.

The Establishment Clause should never force the outcome the Fourth Circuit reached. The fact that a majority of that court was led to believe such an outcome was acceptable demonstrates why certiorari should be granted to clarify the law, redirect such misguided approaches, and discourage these sorts of attacks on United States history.

II. The Bladensburg Peace Cross Is Consistent with the Nation's Long History and Tradition of Honoring Veterans

A. The Peace Cross's History Should Have Raised the Bar for Establishment Clause Challenges

The Fourth Circuit's wooden analysis conflicts with the requirement "that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819. (internal quotation marks and citation omitted). Instead of giving deference to the history and longstanding role the Bladensburg Peace Cross plays in the local community, the panel majority used those factors to find an Establishment Clause violation. That approach is backwards and emphasizes why certiorari should be granted.

The Peace Cross's rich history and tradition should have insulated the monument from this type of challenge—93 years after its dedication in 1925. The panel majority observed (with apparent dismay) that "*[o]ver the years*, memorial services [have] continued to occur *on a regular basis* at the Cross." App. 5a (emphasis added). The opinion also noted that adjacent to the Peace Cross is a plaque stating that the "crossroads *has become* a place for communities to commemorate their residents in service and death." App. 6a-7a (emphasis added) (internal quotation marks and citation omitted). And the Peace Cross "has primarily hosted veteran-focused ceremonies." App. 20a.

Instead of finding that this history protected the memorial, the Fourth Circuit neutralized the Peace Cross's 93-year history and even suggested it implied longstanding harms to be remedied: "It is also true that the Cross has stood unchallenged for [over] 90 years . . . Perhaps the longer a violation persists, the greater the affront to those offended. The Cross's history therefore does not definitively aid either side in the analysis." App. 20a-21a. That is not this Court's standard.

Instead, this Court has explained that a long historical practice weighs ***against*** finding an Establishment Clause violation. For example, in *Van Orden v. Perry*, this Court found that the extensive history of the Ten Commandments in the United States supported the constitutionality of the monument at issue, which had been in place for 40 years before Van Orden filed suit. 545 U.S. at 682, 688-90; *see also Buono*, 559 U.S. at 716 (finding that due to its 70-year history, "the cross and the cause it commemorated had become entwined in the public consciousness"). Similarly, in *Town of Greece v. Galloway*, this Court emphasized the long history of legislative prayer, which had been practiced by Congress since the framing of the Constitution, in upholding Greece's prayer practice, explicitly rejecting any legal test "that would sweep away what has so long been settled." 134 S. Ct. at 1818-19. The Fourth Circuit, therefore, should have viewed the Peace Cross's 93-year history as a factor in its favor. That reasoning should be the law, so other memorials are not placed in danger by similar attacks.

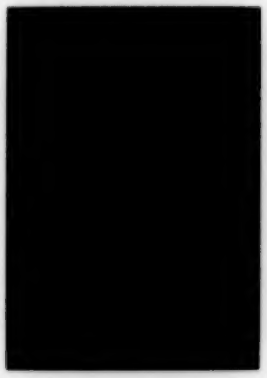
B. The Peace Cross Is a Secular Display, Consistent with Other Military Memorials and Honors that Use Cross Symbols.

The Fourth Circuit's conclusion that "the sectarian elements [of the Peace Cross] easily overwhelm the secular ones," App. 22a, ignores the prominent role religious symbols have historically played in military memorials and honors. Those symbols are not present to endorse one religion but as signs of solemnity and respect. When used in the military context, these symbols are overwhelmingly secular.

From 1919 until 1942, *i.e.*, during the time the Bladensburg Peace Cross was built, the Medal of Honor awarded for naval services was in the shape of a cross:

See Types of MoH, Congressional Medal of Honor Society, http://www.cmohs.org/medal-types.php (last visited July 24, 2018).

The Distinguished Service Cross, the second-highest award for valor bestowed on a solider, was established by President Wilson in 1918. To this day, the award is a "[b]ronze cross suspended from a red, white, and blue ribbon. An eagle rests in the center of the cross. Below the eagle, a scroll bears the inscription 'FOR VALOR.'"

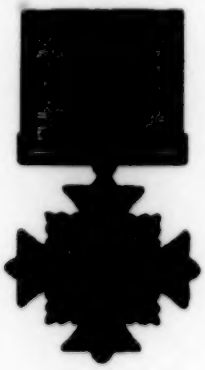


See National Museum of American History, Distinguished Service Cross Medal, http://americanhistory.si.edu/collections/search/object/nmah_447533 (last visited July 24, 2018).

The Navy's second-highest honor is the Navy Cross:

Military Awards for Valor – Top 3: Description of Medals, U.S. Dep't Defense, https://valor.defense.gov/description-of-awards/ (last visited July 24, 2018).

Likewise, the Air Force awards the Distinguished Flying Cross:



Id.; Barry L. Spink, *Distinguished Flying Cross and Air Medal Criteria in the Army Air Forces in World War II*, Air Force Historical Research Agency (Mar. 4, 2010), http://www.afhra.af.mil/Portals/16/documents/Timelines/World%20War%20II/WWIIDFCandAirMedalCriteriaChronological.pdf?ver=2016-09-16-111147-907; *Distinguished Flying Cross*, Air Force's Personnel Center (Aug. 4, 2010), http://www.afpc.af.mil/About/Fact-Sheets/Display/Article/421931/distinguished-flying-cross/ (last visited July 24, 2018).

Crosses are not the only religious symbols that appear in military honors. For example, the five-pointed star used in the Bronze Star and Silver Star utilize a shape that is also a symbol of the Wiccan faith. *See generally McFaul v. Valenzuela*, 684 F.3d 564, 569-70 (5th Cir. 2012) (discussing the use of a pentagram in connection with the Wiccan religion); *McAlister v. Livingston*, 348 F. App'x 923, 926-27 (5th Cir. 2009); *Gelford v. Frank*, 310 F. App'x 887, 888 (7th Cir. 2008). Known as a pentagram, the five-pointed star is akin to the use of a cross by Christians, and some have claimed that the pentagram also represents the five wounds of Jesus in Christianity. *See The Surprising Story Behind the Pentagram*, Universal Life Church (Oct. 10, 2017), http://www.universallifechurch.org/2017/10/10/the-surprising-story-behind-the-pentagram/ (last visited July 24, 2018).

The Fourth Circuit's conclusion "that the historical meaning and physical setting of the [Peace

Cross] overshadows its secular elements" ignores the role religious symbols have long played in military honors. App. 24a. It is an ahistorical approach that, if left intact, would invite all manner of frivolous Establishment Clause challenges to military memorials and regalia. Viewed through the lens of history, the Peace Cross should have been recognized for what it is—a veterans memorial—and accordingly found to be a secular display.

III. The Fourth Circuit's Entanglement Analysis Is Wrong and Jeopardizes Monument Maintenance

Certiorari should also be granted to reverse the Fourth Circuit's flawed entanglement analysis. The Fourth Circuit acknowledged that "[s]pending public funds, though a factor in the analysis, is not necessary for a plaintiff to satisfy the entanglement prong," App. 27a, but then proceeded to find a violation based on the local park commission having "spent at least $117,000 to maintain the Cross and [having] set aside an additional $100,000 for restoration." App. 28a.

The Fourth Circuit's simplistic analysis misses the point of entanglement. Entanglement occurs when there is "sponsorship, financial support, and active involvement of the sovereign *in religious activity*." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (emphasis added). The principal activity here, however, is maintaining a veterans memorial. Routine maintenance and upkeep of a memorial located on public land is a secular purpose and thus constitutes the type of "secular, neutral, or non-

ideological service[]" for which this Court has upheld the use of public funds. *Tilton v. Richardson*, 403 U.S. 672, 687-88 (1971).

Even if the Fourth Circuit's conclusion that the local park commission "is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings," App. 28a, is taken at face value, more analysis is required to find entanglement. This is not a situation where the local park commission is making "annual appropriations that benefit relatively few *religious groups*." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (emphasis added). If there are any specific beneficiaries beyond the local public, they are veterans groups such as the American Legion. This is also hardly a case where it can be said that by maintaining the Peace Cross, "[p]olitical fragmentation and divisiveness on religious lines are . . . likely to be intensified." *Id.* If anything, maintaining the Peace Cross will promote patriotism, unity, and shared remembrance.

The third question presented in the American Legion's certiorari petition—"whether . . . the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to excessive entanglement with religion" is vitally important. In this case, for example, the monument is located in the median of a highway intersection. A failure to maintain the monument would thus result not only in an eyesore but quite possibly in a public safety hazard. Across the country, similar monuments are often located in parks or on other public land. To inhibit localities'

ability to maintain these monuments not only encroaches on their authority but may very well jeopardize the safety of their residents.

CONCLUSION

For the reasons set forth above, and in the petitions of the American Legion and Maryland-National Capital Park and Planning Commission, certiorari should be granted.

Respectfully submitted,

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